carriers. This, AT&T asserts, would be discriminatory. AT&T also asserts (p. 45), without explanation, that in providing such facilities and services the BOCs could use their local exchange position unfairly to advantage their own "wholesale" long distance service and the retail long distance services of their affiliate.

There simply is no basis in the 1996 Act for AT&T's position. Sections 271(b) and (g) specify interLATA services that BOCs may provide to their customers, both other carriers and end users. Section 272(e)(4) permits BOCs to provide facilities and services to other carriers for use in the provision of their services. Neither section references the other, and there is no suggestion in the 1996 Act or the legislative history that Congress intended the two sections to be tied together. Provision of facilities and services for use by any interexchange carrier that elects to use them is not discriminatory, and is, in fact, pro-competitive because it gives the smaller interexchange carriers an alternative source for the facilities and services they obtain today from the large, facilities-based carriers.

AT&T's concerns about cross-subsidization are likewise unfounded. Section 272(e)(4) itself requires the costs of such services and facilities to be "appropriately allocated." Section 272(e)(3) requires charging the same rates to the BOC's affiliate and to unaffiliated interexchange carriers. In addition, §272(b)(5) requires transactions between the BOC and its affiliate to be reduced to writing and made available for public inspection. Any attempted cross-subsidization would be readily detected.

AT&T (pp. 45-47), MCI (pp. 24-25), and ALTS (pp. 1-6) suggest that the BOCs cannot use excess capacity in their official services networks to provide interLATA facilities and services to interLATA carriers, including their separate affiliates. They suggest that the official services networks were financed by intraLATA ratepayers and that the BOCs constructed excess capacity in anticipation of receiving interLATA relief. Therefore, they suggest to permit the use of the official services net-works for that purpose would lead to an improper cross-subsidy. They propose an exogenous adjustment to remove these costs. ALTS, p. 3. Pacific Bell's official services network has been carefully scrutinized by both the California Public Utilities Commission and this Commission. Our initial price caps rates have been significantly reduced by productivity gains. If there is capacity to provide interLATA facilities and services to interLATA carriers, as permitted by §272(e)(4), that is not improper.

V. "Joint Marketing" Should Be Broadly Construed To Best Serve Customers (¶¶ 90-92)

Several commenters (*e.g.*, AT&T, pp. 56-59; LDDS, pp. 15-18; MCI, pp. 45-49; TCG, pp. 6-13; Time Warner, pp. 23-26; CCTA, pp. 5-11; NCTA, pp. 7-12) addressed the 1996 Act's "joint marketing" provisions; most seem unable to understand the clear language of the relevant provisions.

A. BOC InterLATA Affiliates Are Permitted To Market and Sell Local and InterLATA Services Together

Some commenters suggest that the BOC's separate affiliates should be prohibited from marketing and selling the BOC's intraLATA services. This suggestion is completely frivolous and contrary to the intention and language of the 1996 Act.

TCG (pp. 6-13) argues that because §272(a) imposes the separate affiliate requirement on BOCs and BOC affiliates that are subject to §251(c), no BOC affiliate can provide local service and interLATA service together. That is simply an incorrect reading of the 1996 Act. Section 251(c) applies to incumbent LECs, which are local exchange carriers that provided telephone exchange service on the date of enactment of the 1996 Act. §251(c). Consequently, no affiliate that begins to provide telephone exchange service after enactment of the 1996 Act can be an incumbent LEC, and therefore is not prohibited from providing local and interLATA service together. Furthermore, §272(g)(1) specifically permits a separate affiliate to market and sell the telephone exchange services of its affiliated BOC so long as other entities are permitted to market and sell those services.

CCTA (pp. 5-11) and NCTA (pp. 7-12) suggest that if a separate affiliate markets and sells its affiliated BOC's local service a transfer of network functions occurs, making the affiliate a successor and assign of the BOC that cannot also provide interLATA services. This again is an incorrect reading of the 1996 Act. A BOC is permitted to provide services and facilities to, and make its telephone exchange services available for marketing and sale by, its separate affiliate only if it does the same for other carriers. §§272(c), 272(e)(2), 272(e)(4), and 272(g)(1). No one can seriously argue that providing services and facilities to an unaffiliated carrier, or permitting an unaffiliated carrier to market and sell the BOC's services, under terms and conditions available to all, constitutes a transfer of network functions or makes the unaffiliated carrier a successor and assign of the BOC. Since the separate affiliate is treated the same as unaffiliated carriers, it will no more be a successor and assign of the BOC than are the unaffiliated carriers.

The commenters all suggest that if the separate affiliate is permitted to do what the 1996 Act clearly contemplates, discrimination and cross-subsidy will be rampant. They simply ignore the 1996 Act's many safeguards and requirements that prevent those evils from occurring.

B. BOCs' Ability To Jointly Market Should Not Be Inappropriately Constrained

Section 272(g)(2) says that a BOC is not permitted to market or sell the services of its separate affiliate until the Commission has granted authority for the provision of interLATA service. The use of the word "until" clearly means that *when* the Commission has granted authority for the provision of interLATA services, the BOC may market and sell the separate affiliate's services.

The commenters strive to delay as long as possible the competition intended by Congress, and suggest interpretations of §272(g)(2) that would prevent a BOC from effectively marketing and selling its separate affiliate's services. The suggested interpretations are neither required by the 1996 Act, nor by a need to prevent discrimination or cross-subsidy, and will interfere with customers' ability to receive the full benefits of vigorous competition.

AT&T suggests (pp. 57-59) that a BOC cannot market or sell its separate affiliate's services on new connects or when a customer calls the BOC to change its IXC.

LDDS suggests (pp. 16-18) that a BOC may only market or sell its separate affiliate's services on an unbundled basis. MCI suggests (pp. 48-49) that a BOC cannot market and sell its separate affiliate's services on inbound customer calls and cannot make its own services and its separate affiliate's services available from a single source. Time Warner suggests (pp. 24-25) that a BOC is limited to local advertising only. The 1996 Act does not impose the kind of restrictions proposed by commenters.

In order to have the parity of one-stop shopping that Congress intended,[25] the BOCs must be able to do the same types of things, and present services to customers in the same ways, as other telecommunications providers.[26] This means marketing and selling the separate affiliate's services with the other services the BOC markets and sells. The BOC must be able to advertise all of the services it markets and sells, wherever it is authorized to market and sell those services. The BOC must be able to offer customers the packages and bundles of services they desire, including the BOC's services, the separate affiliate's services, and potentially the services of other affiliates. As recognized by MCI (p. 46), bundling of services is "clearly the essence of joint marketing." Of course, the customer will be able to obtain the BOC's services separately as well, at tariffed rates.

The 1996 Act permits marketing and selling of the separate affiliate's services on all customer contacts, without limitation.[27] That does not mean a BOC would not comply with the equal access requirements of §251(g). Pacific Bell will continue to inform customers of their right to select the interLATA carrier of their choice, provide a

[25] *Senate Report,* S.652, p. 43.

[26] MCI also suggests (pp. 45-47) that the limitations on large carriers' ability to jointly market their interLATA services with resold local services does not prevent the large carriers from advertising those services together. That is absurd. The point of the restriction is to create parity between the large carriers and the BOCs. There would be no such parity if the large carriers could advertise the availability of those services together before the BOCs receive interLATA authority.

[27] MCI's comparison to §274(c) is inapt. Section 274(c)(1) creates a general prohibition on BOC marketing and sales activities, which are modified by specifically permitted activities. Section 272(g)(2) creates a general authorization to market and sell, and is not limited by specifically stated prohibitions.

list of available interLATA carriers if the customer wants to hear it, and take the customer's order for the interLATA carrier the customer selects. The only difference is that Pacific Bell will also tell the customer about the interLATA services Pacific Bell is able to market and sell. Pacific Bell will, of course, comply with all of the CPNI rules promulgated in CC Docket No. 96-115.

The BOC must be able to market and sell from a single source, and that source is in no way required by the 1996 Act to be a third party. The BOC will market and sell the separate affiliate's services using the same employees that market and sell the BOC's services. This will be done pursuant to a written agreement that complies with the requirements of §272 and the Commission's affiliate transactions rules.

In determining what is permitted by §272(g)(2), the Commission need only look to how other telecommunications services providers market and sell their services. That is what the 1996 Act permits BOCs to do.

VI. The BOCs' InterLATA Affiliates Will Be Non-Dominant (¶¶ 108-152)

AT&T (pp. 60-66), LDDS (pp. 20-27), MCI (pp. 60-71), and Comptel (p. 33), among others, argue that no analysis of the market power of the BOCs' interLATA affiliates is necessary. They consider the BOCs' affiliates guilty by association. They contend that the BOCs control "local bottleneck facilities that are essential to the provision of long-distance services" (AT&T, p. 61). Hence, their affiliates have market power.

AT&T (p. 65) claims the BOCs have market power in the long distance market because they can leverage their local monopolies to compete unfairly in the long distance market. Alternatively, AT&T (p. 62) claims that the BOCs have a monopoly in the long distance market because they control an essential facility. Both of these arguments are contrary to the essential facilities and monopoly leveraging case law, as well as positions that AT&T has taken in other forums. Monopoly leveraging is a largely discredited theory. Nevertheless, AT&T cannot show that Pacific Bell or Nevada Bell have actually threatened competition in the long distance market. Contrary to AT&T's

position in this proceeding, the mere possession of an essential facility is not illegal and does not require regulation in the long distance market. When, as here, the facility itself is regulated and access is reasonable, there is no reason to assume market power in the downstream market.

Contrary to the assertions of the long distance carriers, there is no realistic possibility that the BOCs will be able to exercise market power in the long distance market. The BOCs will have an initial market share of zero; they must compete against huge companies with established networks; and they are subject to pervasive regulation, including price caps, which removes the incentive to cross subsidize. In fact, BOC entry promises only to lower costs to consumers.[28]

A. *Monopoly Leveraging Is a Discredited Theory*

Section 2 of the Sherman Act applies to single firm conduct that actually achieves a monopoly or which dangerously threatens to achieve a monopoly. In *Berkey Photo, Inc. v. Eastman Kodak, Co.*, 603 F.2d 263 (2nd Cir. 1979), cert. denied, 444 U.S. 1093 (1980), the court extended the traditional analysis of an attempted monopolization case. *Berkey* applied §2 to a single firm that exploited a monopoly in one market to gain an unfair competitive advantage in a second market. The court found that a violation of §2 could exist, even though the firm did not threaten a monopoly in the second market. This theory is known as "monopoly leveraging."

Recent cases have questioned or rejected *Berkey*. In 1993, the Supreme Court cast serious doubt on the theory, noting that the Sherman Act applies to single firm conduct only when it "actually monopolizes or dangerously threatens to do so." [29] The courts of the Ninth and Third circuits have rejected monopoly leveraging outright,[30] as

[28] *See generally* Reply Statement of Professor Jerry A. Hausman, attached to the Reply Comments of USTA.

[29] *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884, 892 (1993).

[30] *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191 (3rd Cir. 1995); *Fineman v. Armstrong World Industries*, 980 F.2d 171, 205 (3rd Cir. 1992), *cert. den.*, 507 U.S. 921 (1993);

have at least six recent district court cases.[31] Finally, the same court that decided *Berkey* dismissed its former discussion of monopoly leveraging as "dictum."[32] The difficulty is that a monopolist has little incentive to engage in predatory conduct in an adjacent competitive market where competition or low barriers to entry preclude recoupment.[33]

Even if monopoly leveraging is viable, its elements are not present in the long distance market. *Berkey* still requires the monopolist to commit anticompetitive acts in the second market that cause "tangible harm to competition." Pacific Bell and Nevada Bell have not committed any anticompetitive acts in the long distance market. They do not have any market share. Their long distance affiliate has none and is unlikely to obtain a significant share of the nationwide long distance market, and certainly it cannot set prices in the long distance market.

B. Ownership of Local Facilities Does Not Confer Market Power in Long Distance

AT&T (p. 62) claims that Pacific Bell's ownership of local facilities is a bottleneck monopoly. From this, AT&T urges the Commission to assume that Pacific Bell and Nevada Bell have monopoly power in the long distance market and regulate their long distance affiliate accordingly. AT&T not only misrepresents the law of essential facilities, its current position is entirely inconsistent with the position it took in defense of an essential facility claim.

Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536 (9th Cir. 1991), *cert. den.*, 503 U.S. 977 (1992).

[31] *Davis v. Southern Bell Telephone & Telegraph Co.*, 1994-1 Trade Cas. (CCH) ¶ 70,510 (S.D. Fla. 1994); *Spruce Oil Corporation v. Archer-Daniels-Midland Co.*, 870 F.Supp. 1005 (D. Colo. 1994); *Home Health Systems, Inc. v. Liberty Health System,* 1994-2 Trade Cas. (CCH) ¶ 70,699 (E.D. Pa. 1994) *aff'd*, 65 F.3d 162 (3rd Cir. 1995); *Centennial School District v. Independence Blue Cross*, 885 F.Supp. 683 (E.D. Pa. 1994); *Advo, Inc. v. Philadelphia Newspapers*, 854 F.Supp. 367 (E.D. Pa. 1994); *Advanced Health-Care Services v. Giles Memorial Hospital*, 846 F.Supp. 488 (W.D. Va. 1994).

[32] *Twin Labs, Inc. v. Weider Health and Fitness*, 900 F.2d 566, 570 (2nd Cir 1990).

[33] *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d at 1203.

The essential facilities doctrine "is a streamlined technique for proving actual monopolization in violation of section 2 of the Sherman Act."[34] It applies "when one firm that controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first."[35] Anticompetitive conduct cannot be assumed from control of the essential facility. The harm only occurs when the entity unreasonably refuses access and eliminates competition in the downstream market. For example, in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), Otter Tail's refusal to offer wholesale power eliminated retail competition in the electric market. Similarly, in *MCI Communications v. AT&T,* 708 F.2d 1081 (7th Cir.), *cert. denied,* 464 U.S. 891 (1983), AT&T's refusal to permit interconnection eliminated competition in the long distance market.

As AT&T successfully argued in *International Audiotext Network v. American Tel. & Tel.*, 893 F.Supp. 1207, 1213-1214 (S.D.N.Y. 1994), *aff'd*, 62 F.3d 69 (2nd Cir. 1995) the mere possession of the network for transporting calls does not give rise to the inference that the owner will or has denied access to the facility. Put differently, there is no actual or attempted monopoly when an entity grants reasonable access to the facility.[36] And where a firm is subject to effective regulation, it does not have the monopoly power essential to an actual or attempted monopoly claim.[37]

Pacific Bell and Nevada Bell have not denied long distance carriers access to their local facilities. Nor can they eliminate competition in the long distance market since this Commission effectively regulates access to local facilities. There is no reason to introduce regulatory distortions in the unrelated long distance market to address a harm that has not happened, cannot happen and should not be presumed.

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[34] Holmes, ANTITRUST LAW HANDBOOK, 1996 EDITION, p. 444.

[35] *Alaska Airlines v. United Airlines*, 948 F.2d 536, 542 (9th Cir. 1991).

[36] *City of Vernon v. Southern California Edison Co.*, 955 F. 2d 1361 (9th Cir. 1992), *cert. den.*, 506 U.S. 908 (1992); *Illinois Bell Telephone Co. v. Haines & Co.*, 905 F.2d 1081 (7th Cir. 1990).

[37] *Metro Mobile CTS v. Vector Communications*, 892 F.2d 62 (9th Cir. 1989).

Thus, while AT&T's and others' arguments for dominant regulation have the "look and feel" of antitrust arguments, they have no basis in antitrust law.

C. *Incumbent IXCs Simply Ignore Provisions of the 1996 Act*

The incumbent IXCs' arguments ignore current regulation of LECs, or alternatively assume that regulators are incompetent. In their comments, the incumbent IXCs also overlook, misconstrue, or belittle all provisions of the 1996 Act that are at odds with the monopoly leveraging argument. The IXCs ignore the structural separation requirements of §§272(a) and (b), and therefore do not distinguish between BOCs and their independent §272 interLATA affiliates. They ignore the imputation requirement of §272(e)(3), and all other nonstructural safeguards of the Act. They ignore the effect of §251 and §252 on benefits and burdens of owning the "local bottleneck." Even if the multiple layers of regulation that were applied to the "local bottleneck" before passage of the 1996 Act were not already sufficient to prevent so-called "monopoly leveraging," the plausibility of the allegation is completely destroyed by the 1996 Act.

The Commission's interconnection rules, which Chairman Hundt compared to "the break-up of the Standard Oil Trust,"[38] are a case in point. It is not accurate to say the regulations destroyed the market power inherent in owning the "local bottleneck," because due to the multiple layers of comprehensive regulation that applied to the local exchange, there was no market power in the local exchange. If the BOCs could have controlled the local exchange, the new regulations completely dismantle the local exchange network and deprive them of any control over it now. Specifically, the interconnection rules provide competing carriers the right to obtain all functionalities they deem necessary to provide any telecommunications service. Incumbent LECs may neither impose "limitations, restrictions, or requirements on requests for, or the sale or use of, unbundled

[38] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Service Providers*, CC Docket Nos. 96-98, 95-185, *First Report and Order*, FCC 96-325 (released August 8, 1996) ("Interconnection Order"), Separate Statement of Chairman Reed E. Hundt.

elements, nor may they restrict requesting carriers from combining elements with any technically compatible equipment the requesting carriers own."[39] Incumbent LECs must combine and provision elements for competitors in any way requested, subject only to technical feasibility standards.[40]

Under this regime, the BOCs do not have exclusive control of a bottleneck facility. Competing carriers now have the right to control the facilities they obtain from the BOCs. The previously unified local exchange network is now a plethora of competing networks. The unbundling requirements permit competing carriers to piece together complete alternative local exchange networks, thereby eliminating any previous barrier to entry due to the scale of construction required.

The interconnection rules also impose strict new nondiscrimination requirements on incumbent LECs. For example, the quality of a network element must be "equal between all carriers requesting access to that element; second, where technically feasible, the access and unbundled network element provided by an incumbent LEC must be at least equal-in-quality to that which the incumbent LEC provides to itself."[41] The Commission expects the states to adopt, "inter alia, specific rules determining the timing in which incumbent LECs must provision certain elements, and any other specific conditions they deem necessary."[42] The states are also encouraged to adopt "some type of reporting requirement to ensure that [incumbent LECs] provision unbundled elements in a nondiscriminatory manner."[43]

For interconnection, the Commission has broken new ground by opining that even just and reasonable discrimination may be unlawful.[44] Likewise, the

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[39] Interconnection Order, ¶292.

[40] *See id.*

[41] *Id.* at ¶312.

[42] *Id.* at ¶310.

[43] *Id.* at ¶311.

[44] *See id.* at ¶217.

Commission has held that incumbent LECs may not "discriminate against competitors in a manner imperceptible to end users."[45] Nobody can accuse this Commission of facilitating discrimination in favor of the BOCs' affiliates. The interconnection rules make discrimination in favor of the BOCs' affiliates more implausible than ever.

The incumbent IXCs also ignore the imputation and structural separation requirements of the 1996 Act. For example, LDDS (p. 22) refers to the "unfair cost advantage" that BOC affiliates allegedly will have:

> the RBOC will take advantage of the fact that its competitors must pay what are concededly above-cost rates for access and price its affiliates' interLATA services below a level that its competitors profitably can match, thereby taking market share away from existing long distance carriers even though the RBOC's services and pricing—but for its artificial cost advantage—are no better than its competitors.

LDDS pretends that there is no structural separation between the BOC and its interLATA affiliate and refers to both simply as "the RBOC". Without such a fictional pretense, the allegation crumbles. The BOC's interLATA affiliate will pay the same rate for access as its rivals. It has no "artificial cost advantage." The affiliate could not lawfully price its interLATA services "below a level that its competitors profitably can match" unless it is more efficient than those competitors—a pro-competitive outcome that should not under any circumstances be discouraged.

Lower prices, however, are exactly what the IXCs seek to discourage. AT&T candidly admits that while price *ceilings* for the BOCs' affiliates may not be necessary, price *floors* would be. (AT&T, pp. 65-66.) Likewise, MCI contends that while some requirements of dominant regulation might be dispensed with, the BOCs' affiliates must be required to file tariffs on advance notice with cost support subject to the scrutiny of their competitors. (MCI, p. 65.) Time Warner asserts that cost support is necessary for the BOCs' affiliates to prove they are complying with the imputation test of §272(e)(3). (TWC, p. 39.)

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[45] *Id.* at ¶224.

The reasoning of these IXCs could not be more cynical. They assume the purpose of dominant regulation is to "protect" consumers from lower prices. A more perfect example of "how regulated competition all too often becomes cartel management"[46] could hardly be imagined. Market power, as the Commission correctly acknowledges (*NPRM*, ¶114), is exercised by *raising* prices, not by lowering them. Dominant regulation characterized by price floors but no price ceilings, as AT&T suggests, is an absurdity that unmasks these IXCs' real concerns.

Contrary to what TWC (p. 39) and LDDS (p. 23) say, neither filing cost support with tariffs, nor reporting earnings separately for the BOCs' affiliates is needed to enforce the imputation requirement or ensure the BOCs' affiliates' prices are above relevant costs. The BOCs' affiliates must keep separate books of account. The Commission can and will audit those books. Since the *Fifth Report and Order* in *Competitive Carrier*, independent LECs have provided interexchange service subject to requirements to keep separate books of account and pay affiliated local exchange carriers for services at tariffed rates. Yet we know of no complaints alleging below-cost pricing.

Subjecting the BOCs' interLATA affiliates to advance filing and cost support requirements would not benefit consumers. Instead incumbent IXCs—who actually dominate the market but are subject to no such requirements—would be able to maintain their current profit margins by protesting lower prices; impose waiting periods on new entrants' price changes; and perhaps gain access to proprietary plans and information. If the long distance market were fully competitive it would probably be typified (like the air transportation industry, with which it shares many cost and demand characteristics) by deep discounting and frequent price decreases that spread from one carrier to another almost instantaneously. If the BOCs' affiliates tariffs were subjected to cost review and long notice periods, it is possible that this competitive state of affairs will never be

[46] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor,* 84 FCC 2d 445, (1981), ¶26.

realized. The long distance market would continue to stagnate, to the financial benefit of incumbent IXCs.

D. *There Is No Reason To Treat the BOCs as Dominant in the International Market.*

Our Comments noted that another set of rules, administered by the International Bureau, determine the regulatory treatment of international carriers on a route by route basis. We suggested[47] that the Commission craft a procedure to rapidly review any foreign market affiliations of an RBOC, and determine the appropriate regulatory treatment. So that BOC affiliates may offer a full range of services as soon as feasible—the clear intent behind the 1996 Act—we recommended that this process be concluded no later than the grant of a §271 applications, if not before. We also noted that the entry of BOC affiliates into the international marketplace poses no threat whatsoever to competition.[48] Other carriers concurred with this view.[49]

Only two parties fearful of competition, disagreed.[50] Sprint took no position on nondominance internationally but argued that the classification of a BOC affiliate should turn upon (1) "the kind and degree of separation between the BOC and its affiliate" and (2) "how quickly the Commission can rationalize current anomalies in interstate access pricing." (p. 63.)

Neither Sprint nor MCI provide any data that could justify regulation of a BOC affiliate as dominant. Sprint's objections are easily disposed of. The degree of separation is established by §272, compliance with which is a condition precedent for BOC affiliate entry. After conforming to the law, the affiliates should be nondominant. Moreover, the Commission has already stated access charge reform will occur soon.

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[47] Pacific Telesis Group Comments at 69.

[48] *Id.* at 68-69.

[49] *See, e.g.*, Comments of NYNEX at 60-61.

[50] In addition, Excel (p. 10) mentions international services but does not explain why BOC affiliates could not be regulated as nondominant.

MCI fires off a scatter-shot of arguments, all apparently intended to delay and hamstring BOC competition in international markets. These contentions have the all-too-familiar ring of the protectionist positions taken by AT&T in years past, when it sought to stymie MCI's entry as a domestic competitor. In no event should the Commission allow MCI to side-track this proceeding. Policy questions relating to foreign agreements should be considered on a broad, industry-wide basis in the Commission's ongoing proceeding entitled Regulation of International Accounting Rates, Phase II, CC Docket No. 90-337 where the resolution of those issues will not hinder the processing of BOC applications to compete in international markets. However, we briefly note why MCI's arguments are frivolous and interposed for delay.

First, MCI (pp. 68-71) fears that BOC affiliates could negotiate a "variety of special arrangements" with foreign carriers that allegedly could disadvantage international competition.[51] Second, it specifically requests the Commission to forbid a facilities-based BOC affiliate from arranging with a foreign carrier to send the BOC proportionate return traffic bound only for in-region termination. Finally, MCI requests that the Commission impose on any BOC affiliate offering international services the same conditions as applied to MCI because of British Telecom's investment.

As MCI is well aware, the Commission already indicated it would entertain geographic-based return traffic and special arrangements agreements in its recent *Policy Statement on Accounting Rate Reform*:

> [T]he fundamental assumption of the traditional system (*i.e.*, services provided jointly by two carriers) may not be the best way to organize new global services in the future. . . .[Thus,] an exclusive reliance on the traditional accounting rate system is no longer appropriate.[52]

[51] MCI specifically mentions concluding "interconnect at the foreign switch" agreements, that it claims would unfairly bypass the settlements and proportionate return process.

[52] *Policy Statement on Accounting Rate Reform*, 11 FCC Rcd 3146 (1996), paras. 19-20.

The Commission concluded that more flexible arrangements could result in new and innovative services at lower prices—perhaps what MCI dreads—but would be in the public interest.[53]

MCI's objection to regionally-sorted return traffic is contrary to efficiency and thus flatly anticompetitive. MCI's sole objection seems to be that, by taking advantage of efficiencies of distribution such arrangements would "reduce the affiliate's costs." Therefore, the BOC affiliate should be handicapped to protect other, less efficient, competitors. This "cherry picking" objection should carry no weight under the pro-competitive 1996 Act. No discrimination is involved. MCI has not alleged that similar agreements would not be available to all U.S. carriers.[54] In fact, MCI wants foreign carriers to engage in similar practices for facilities-based out-of-region traffic.[55]

Finally, MCI has proffered no justification to impose a host of burdensome reporting requirements. The MCI-BT reporting requirements were imposed because of unique circumstances—significant foreign investment by a dominant local and long distance U.K. exchange carrier.

In any case, no such boilerplate conditions are necessary. MCI provides no evidence, or even a description, of how such alleged market distortions could exist. Nor could such a situation arise: The 1996 Act, particularly §§251, 271, and 272 were carefully

[53] In any case, hypothetical "special arrangements" are common to all carriers and have nothing to do with the entry of BOC affiliates into the interLATA market. The Commission accepted comments on a framework for alternative settlement arrangements -- MCI's special arrangements. *Regulation of International Accounting Rates, Phase II,* 11 FCC Rcd 6332 (1996), ¶29. MCI claims (p. 69) that the special arrangements are especially likely where the BOC has an interest in the foreign carrier. There is no need to consider any such interests or arrangements in this proceeding.

[54] MCI, if it wishes, could concentrate its local exchange facilities geographically and take advantage of the same plan.

[55] *Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services,* CC Docket No. 96-21, MCI Petition for Reconsideration (August 8, 1996). Although we will take issue with MCI's Petition for other reasons in the appropriate forum at the appropriate time, it is noteworthy that MCI itself must have concluded that regional-sorted return traffic agreements are lawful.

crafted to address these issues. BOC affiliates simply may not enter the interLATA market (including international) in region until they provide interconnection and are fully separated from the BOC. Congress has concluded that those conditions—which are quite burdensome—are sufficient. The Commission cannot, and should not, add to the list.[56]

VII. The Commission Should Enforce Sections 271 And 272 in Accordance with the Law (¶¶ 94-107)

A. *Shifting the Burden of Proof to the BOCs Would Violate the APA*

. Predictably, those that do not wish to see the BOCs succeed in the new markets opened by the 1996 Act also support shifting the burden of proof to the BOCs in complaint proceedings under §271(d)(6). They cite no legal support. AT&T's argument (pp. 50-51) is typical: the burden of proof should shift because of the short time frame for resolving complaints and because the BOC's have the relevant information. These reasons, as we and others have shown do not justify shifting the burden.

AT&T makes another curious argument, namely that the burden should shift by analogy with the provision in §271(d)(3), which AT&T reads to place the burden of proof on the BOCs regarding approval of their interLATA applications. This analogy fails for several reasons. First, under §271(d)(3), the BOC would be the proponent of an order, whereas under §271(d)(6) the complainant is the proponent. In each case the proponent rightly bears the burden. Second, as AT&T notes, Congress's language in section 271(d)(3) ("The Commission shall not ... unless") can be read to place a burden on the applicant; Congress did not use similar language in section 271(d)(6), yet it certainly could

[56] Even BT -- MCI's 25 percent owner -- agrees with this. In its Petition to be declared non-dominant in the U.S. (ISP-96-007-ND, filed Aug. 2, 1996), BT North America asserts (at 20-29) that BT cannot use any bottleneck control of U.K. facilities to discriminate, because it is subject to effective regulation in the U.K. The 1996 Act is significantly more rigorous that existing U.K. law in ensuring that affiliates of local exchange carriers cannot leverage any remaining market power in the local market. Therefore, *a fortiori*, U.S. law must be sufficient to make unnecessary either dominant treatment or any additional reporting requirements. Put differently, if an affiliate of BT -- which offers the preponderance of both long distance and local services in the U.K. -- can be classified as non-dominant on the U.S.-U.K. route, affiliates of BOCs should be a simpler case.

have if it intended to require a shifting of the burden of proof. Third, a BOC will have already met a burden of proving that it has met the requirements for interLATA entry and should not be required to re-meet that burden upon the complaint of any party that was dissatisfied with the outcome of the process under §271(d)(3).

Section 7(c) of the Administrative Procedure Act ("APA") is clear that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."[57] Nothing in the Communications Act provides for shifting the burden of proof to the BOC. Moreover, one cannot find any implicit authority in the 1996 Act to shift the burden, as the Supreme Court would "not lightly presume exemptions to the APA."[58] Finally, the assignment of the burden of proof is a matter of substantive law, not merely a procedural matter that the Commission can implement without specific Congressional authority.[59] Hence, the APA controls. Specifically, the APA requires that the burden of persuasion, not simply the burden of establishing a *prima facie* case,[60] always be on the complainant.[61] Thus, if a complainant asserts that a BOC has violated §§271 or 272, it must persuade the Commission the truth of the propositions it asserts in order to prevail. At some point, the complainant may introduce sufficient evidence to establish a *prima facie* case. In this instance, the burden of going forward or the burden of producing evidence may shift to the BOC,[62] but the complainant still must bear the "heavy burden of

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[57] 5 U.S.C. §556(d).

[58] *Brownell v. Tom We Shung*, 352 U.S. 180, 185 (1956); *Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries*, 114 S. Ct. 2251, 2254 (1984)

[59] *See American Dredging Co. v. Miller*, 114 S. Ct. 981, 988 (1994); 114 S. Ct. 2251, at 2254.

[60] *See Brosnam v. Brosnan*, 363 U.S. 345, 349 (1923).

[61] *Department of Labor v. Mahn Terminals,* 114 S. Ct. 2251 (1994), at 2256-57. *Cf.* 47 U.S.C. §§309(e) and 312(d) (a party has *both* the "burden of proceeding with the introduction of evidence and the burden of proof").

[62] At least one interexchange carrier seems to recognize the legal difficulties in shifting the burden of proof, and notes that "at least the burden of going forward" would shift to the BOC. Sprint, p. 56.

persuasion."[63] Only if the BOC chooses to assert an affirmative defense, *e.g.*, competitive necessity or reasonableness of the discrimination, would the BOC have the burden of proving the truth of its defense.

B. The Commission Should Address Specific Complaint Procedures in a Separate Rulemaking

Commenting parties make a variety of suggestions about the procedures to be followed by the Commission in acting on complaints under §§271 and 272. For example, AT&T (p. 52) sets forth a recommended procedural schedule. Sprint (p.57, n.39) notes the need for improvements to the Commission's discovery mechanisms. The New Jersey Division of Ratepayer Advocate (pp. 4-5) recommends specific complaint procedures. While we agree that is important for the Commission to adopt complaint procedures, it would be unfair to do so in this proceeding. In the NPRM, the Commission indicated that it expects to initiate a separate proceeding addressing the expedited complaint procedures mandated by the 1996 Act. *NPRM,* p. 47, n.171. In view of this, most parties did not comment on this issue. Thus, this docket does not have an adequate record on which to base any new procedural rules and any such action should await the forthcoming complaint procedure rulemaking.

The Commission requested comment on whether the adoption of alternative dispute resolution (ADR) procedures would facilitate resolution of complaints under §§271 and 272. *NPRM,* ¶107. Several parties supported this concept.[64] We agree that ADR may prove helpful under some circumstances, but the record in this proceeding is not adequate to adopt specific procedures. Therefore, we believe that the question of ADR should also be addressed in the forthcoming rulemaking on expedited rulemaking procedures.

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[63] *Radio Corp. of America v. Radio Engineering Laboratories, Inc.*, 293 U.S. 1, 7-8 (1934).

[64] *E.g.*, NYNEX at 75-76; ATSI at 15-16.

VIII. Conclusion

For the reasons given, we urge the Commission to reject the anticompetitive reading of the 1996 Act propounded by carriers who object to full and fair competition by the BOCs in interLATA markets. Congress intended competition to be vigorous; Congress intended regulation to be the minimum necessary; Congress intended that the BOCs would fully participate in interLATA markets. All we ask is that the Commission respect what Congress has asked it to do.

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